BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFERY L. VALYER Claimant	)	
VS.	)	
PAYLESS SHOESOURCE, INC. Respondent	)	Docket No. 1,040,596
AND	)	
ZURICH AMERICAN INSURANCE COMPANY Insurance Carrier	)	

ORDER

Respondent requested review of the February 18, 2011, Award by Administrative Law Judge Brad E. Avery (ALJ). The Board heard oral argument on June 22, 2011. E. L. Lee Kinch, of Wichita, Kansas, was appointed as a Pro Tem in this matter.

Claimant appeared by his attorney, Frank D. Taff, of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, James C. Wright, of Topeka, Kansas.

The Board has considered the record and adopted the stipulations listed in the Award. Additionally, pursuant to the stipulation of the parties filed with the Division of Workers Compensation on December 22, 2010, claimant was paid temporary total disability compensation (TTD) for 89 weeks. The parties agreed that claimant had been overpaid for 3.14 weeks, leaving 85.86 weeks that claimant was temporarily and totally disabled and entitled to TTD. The Award of the ALJ will be modified accordingly.

ISSUES

The ALJ found that claimant suffered personal injury by accident arising out of and in the course of his employment with respondent and found claimant entitled to

a 74.84 percent work disability. He did not feel that claimant was permanently and totally disabled as he is still capable of working.

The respondent requests review of the following:

1. Did claimant sustain personal injury by accident on February 19, 2008, or was the injury due to the natural aging process and/or normal activities of day-to-day living?

2. Was sufficient foundation established for the admission of the 2005 medical records for treatment and testing at St. Francis Health Center?

3. Is there a clerical/mathematical error in determining how much compensation is due as of the date of the Award?

Respondent argues that claimant did not suffer a compensable injury and that claimant's symptoms are due to the natural aging process and brought on by the normal activities of day-to-day living. Respondent also argues that the 2005 medical records from St. Francis Health Center and respondent's attorney's March 9, 2009, letter[1] should be admitted into evidence because claimant already agreed to the March 9, 2009, letter and certain medical when offered at the December 3, 2010, deposition of Geoffrey Blatt, M.D., and its continuation on January 28, 2011, as part of Exhibit 9. Finally, respondent argues that there is a clerical error in the ALJ's calculation of the award.

Claimant argues that the ALJ was correct in denying admission of medical records from St. Francis and in finding that he has not engaged in any substantial, gainful employment since February 19, 2008, and did not have a preexisting impairment. Claimant contends that the Award should be modified to reflect that claimant is entitled to an award for permanent total disability.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact:

Claimant initially worked for respondent in 2007, through Labor Pro, a temporary employment service, working in a warehouse, changing the price tags on shoes and boxing

[1] Letter from respondent's attorney to Dr. Blatt dated March 9, 2009. (Blatt Depo. (Dec. 3, 2010), Ex. 7.)

them up to be shipped out. This lasted for several months, with claimant leaving in November 2007 for another job. Claimant returned to work at respondent through Labor Pro in January 2008. At that time, claimant applied for a full-time position with respondent. Claimant was hired for a regular job with respondent in February 2008. His first day as a regular employee was on February 19, 2008. Claimant began his new job on the Kozan machine, a machine that empties cases of shoe boxes onto a conveyer where the shoes are scanned and then pushed through individual chutes where they are packed into boxes.

On his first day on the job, claimant came to work early before his 4:30 a.m. start time. He underwent orientation and then went to work. At about 8:30 a.m., claimant was reaching to approximately head level for an empty box, when his back snapped. Claimant had been actually working for a little over one hour. Claimant reported the incident to his supervisor and filled out an accident report. Claimant was sent to St. Francis Health Center for treatment. Claimant testified that his job with respondent required a lot of bending and twisting. He had never had any problems with his back until he felt the pop in his back on February 19, 2008.

Claimant reported the incident to the his supervisor, his line worker, the chief supervisor and the plant manager. Claimant testified that he recalls filling out an accident report[2] and was sent to the hospital for medical treatment at St. Francis Health Center. Claimant testified that although he signed the accident report, some of the information on the sheet is not correct. For example, the form indicated that he was not wearing a back belt at the time of the incident, but he claims one was never given to him when he started the job.[3] Claimant was told to come back to the hospital in a few days to meet with Donald T. Mead, M.D., the workers compensation physician.

When claimant met with Dr. Mead, his back was irritated. Physical therapy was recommended, and he was sent to Florin O. Nicolae, M.D., for epidural injections. Claimant underwent electric shock treatments in an attempt to stretch claimant's back. Claimant had 4 to 5 weeks of physical therapy and continued to work light duty sitting at a table for several hours a day.[4] Claimant testified that the rehabilitation made his back worse. Claimant also stated that the injections did not help. Respondent's insurance company sent him to Dr. Reintjes in Kansas City for some testing. Claimant stated that after 90 days of therapy, he was sent home.

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[2] An objection was made and overruled in regard to this report. (Resp. Ex. C (Distribution Center Accident Report).)

[3] P.H. Trans. at 21-22.

[4] P.H. Trans. at 10-11.

Claimant admits to a prior back injury and hip pain on the right side from prolonged standing. Claimant testified that this occurred while he worked for Adams Business Forms (Adams) in 2005.[5] Claimant had injections for this injury and suffered no long-term problems. Currently, claimant complains of back pain on the left side that goes down into his buttocks, down the back of his left leg and into his foot, and his foot goes numb.[6] Claimant has had this numbness for around 5 months and has used a cane to ambulate. Claimant was not able to make it to his next appointment with Dr. Reintjes, but they talked over the phone. When claimant reported his problems, the doctor told him that he must have a bruised spinal cord and it was going to take time to heal.[7] Claimant is not working and cannot do any lifting. He has a hard time walking due to a limp.

Dr. Reintjes opined in a letter dated June 23, 2008, that the changes in claimant's back are longstanding and chronic in nature and that claimant had advanced degenerative changes at L5-S1, but he did not relate these changes to claimant's work injury.[8] Claimant testified that no doctor diagnosed him with arthritis in his back before February 2008.[9] He even had an MRI in 2005 and was never told of narrowing of his spine before February 2008. Dr. Reintjes went on to opine that claimant had left L5-S1 lateral recess stenosis that preexisted claimant's employment, but he did not recommend surgery.

Since the incident, claimant was unable to take care of his housework. Claimant continues to drive, but admits that it is uncomfortable.

Claimant has been homeless since March of 2009 and lives in his truck. He receives $200 in food stamps, $100 assistance from SRS and has a medical card. Claimant testified that he had been drawing unemployment compensation until he lost his house and ended up with no place to live. He stated that he did not know how to get ahold of anyone to report these events. Claimant is currently living in his truck, which is not comfortable for his back. Claimant stated that he has been living in his truck since the end of June, first of July 2010.[10]

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[5] P.H. Trans. at 15-16.

[6] P.H. Trans. at 16.

[7] P.H. Trans. at 18.

[8] P.H. Trans., Cl. Ex. 3 at 3 (Dr. Reintjes' June 23, 2008 letter). This is also Resp. Ex. A.

[9] P.H. Trans. at 27-28.

[10] R.H. Trans. at 65-66.

Claimant had surgery on his back in November 2009, two days before Thanksgiving. Before the surgery, claimant complained of sharp pain in his back every time he walked, stood or moved. He testified that the pain went from the middle of his back, down the back side of his left leg and all the way down to his foot. He testified that since the surgery, he does not have the sharp pain when he walks, but still has the pain down his left and right side and the back side of his legs, down to his knees.[11] Claimant indicated that the symptoms in his left and right hip and legs were present before the surgery and were from the injury. Claimant testified that he cannot stand for more than 10 minutes without pain.

Claimant testified that although he is able to drive, he has to keep moving around in his seat and cannot lean backwards. He stated that 45 minutes is the maximum he is able to drive while sitting up straight. After that, he has to pull over and get out to stand and stretch.

Claimant testified that he has a heart condition and attributes the swelling in his legs (left leg, thigh and calf, and right thigh) to that.[12] Claimant indicated that in 2005, he reported back problems to Raymond D. Magee, D.O., his family physician at the time, and was referred to Dr. Nicolae and was given a series of epidural injections. Claimant was working for Adams at the time. Claimant did not relate his back problems at that time to his work with Adams. Instead, he reported that he woke up with the back pain and did not feel it was work related.[13] Claimant does not recall Dr. Magee telling him that he has a degenerative condition in his low back. Claimant stated that the first doctor to tell him he had a degenerative condition in his low back was Dr. Reintjes.

Claimant admitted to a history of migraine headaches for which he takes Darvocet as needed. He takes aspirin due to a history of strokes. Claimant stated that he used to take Coumadin, but could not afford it. Claimant also takes Ibuprofen twice a week as needed.

Claimant testified that up until the moment his back popped, he had been able to do his job without complaint. Claimant indicated that reaching for a box on a trolley is similar to trying to reach up for something far away.[14] Claimant stated that his back had never popped like that before. He stated that the pain was so bad it brought tears to his eyes and he was not able to put weight on his left leg.

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[11] R.H. Trans. at 14.

[12] R.H. Trans. at 25.

[13] R.H. Trans. at 28.

[14] R.H. Trans. at 50.

Claimant had a prior workers compensation claim to his neck while working for Adams. However, he was caught on videotape helping a neighbor move some furniture. Claimant did not have an attorney at the time so he has never seen the videotape to verify that it was him moving anything.[15]

Claimant testified that he has tried to find work through another temporary agency, Labor Max, but he was not successful because of his heart problems. (At one point, claimant was having chest pains and an ambulance had to be called.) He was told by the office personnel at Labor Max that they could not help because Labor Max needed healthy people to go out on jobs.

Paul Lassley, an acquaintance of claimant's, rented a room from claimant for a flat fee of $1,300.00 which was to be from April 2008 to December 2008 or January 2009, with the understanding that claimant was going to get all of the utilities turned on as soon as he received his disability. Claimant told Mr. Lassley that he thought he would receive $50,000.00 to 60,000.00.[16] Mr. Lassley testified that claimant did odd chores around the house and never complained of these activities affecting his back. Mr. Lassley also testified that since there was no running water in the house, claimant used a bucket in the basement as a toilet and would carry it upstairs and dump it in the alley. He never noticed claimant having any trouble making his way up the stairs. Claimant also helped Mr. Lassley build a fence, and claimant seemed to have no problem lifting heavy pieces of wood.

Mr. Lassley testified that at one point, when claimant realized he was being watched, he asked Mr. Lassley to help carry things and take out the trash so that no one would know what claimant was capable of doing.[17]

Mr. Lassley testified that he met claimant through his dealings with Labor Pro. Mr. Lassley never worked for Payless himself. Mr. Lassley suspected claimant was perpetrating some kind of fraud against Payless. When Mr. Lassley reported this, he was no longer living with claimant, because claimant tried to increase the amount of rent he was paying even though Mr. Lassley had already paid rent up through the first of the year. It was pointed out that Mr. Lassley has an extensive criminal history.[18]

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[15] R.H. Trans. at 53.

[16] Lassley Depo. at 22.

[17] Lassley Depo. at 61-62.

[18] Lassley Depo. at 22-33.

Claimant met with board certified orthopedic surgeon Mark Bernhardt, M.D., on September 1, 2009, for an independent medical evaluation (IME). Claimant's chief complaints were of low back and left leg pain. After examining claimant and reviewing his medical records, Dr. Bernhardt opined that claimant had chronic low back pain; chronic lumbar radiculopathy of the left leg; L4-5 disk protrusion, central and right sided; and L5-S1 lateral recess stenosis due to osteophyte.[19] Dr. Bernhardt opined that he was in agreement with Dr. Reintjes and Dr. Blatt that surgery is a reasonable option to help claimant with some of his pain, namely the left leg radicular pain. Dr. Bernhardt did not feel that a laminectomy would help with the axial low back pain.[20]

Dr. Bernhardt went on to opine that the disk herniation at L4-5 with resultant stenosis and the osteophyte at L5-S1 with resultant stenosis preexisted claimant's February 19, 2008, injury. But the work activities contributed significantly to the onset of claimant's new symptoms and the need for surgery.

Dr. Bernhardt indicated that claimant had a history of back problems before November 2005 and the back problems were revealed on the November 7, 2005, MRI. He opined that if claimant had not already had a herniated disc, he might not have suffered a herniated disc with that activity.[21] Dr. Bernhardt opined that claimant's preexisting condition in the spine was part of the natural aging process. He opined that he did not think claimant would have developed recurrent symptoms and the need for surgery if not for his preexisting condition. Dr. Bernhardt also opined that the activities of February 19, 2008, did not cause any underlying changes in the structure of claimant's body or any change in claimant's preexisting condition because the disc herniation on the 2008 MRI looked no different than on the 2005 MRI.[22] Dr. Bernhardt went on to find claimant to have a 5 percent preexisting whole person functional impairment, finding that claimant met the requirements of DRE lumbosacral category II from the fourth edition of the AMA *Guides*.[23]

Claimant, at the request of his attorney, met with Daniel Zimmerman, M.D., on July 12, 2010. Claimant reported that he had not worked since February 19, 2008, after sustaining injury to his lumbosacral spine on his first day of full employment with respondent. Claimant reported that he was only able to sit for 30 minutes and stand for 10 minutes before experiencing discomfort in his lumbosacral spine. He reported being

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[19] Bernhardt Depo., Resp. Ex. B at 4 (Dr. Bernhardt's Sept. 1, 2009 report).

[20] Bernhardt Depo., Resp. Ex. B at 4 (Dr. Bernhardt's Sept. 1, 2009 report).

[21] Bernhardt Depo. at 13.

[22] Bernhardt Depo. at 14.

[23] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

able to walk one block before having to use a cane and reported continuous numbness and tingling in his feet.

Dr. Zimmerman examined claimant and opined that due to the permanent aggravation of lumbar disk disease at L4-L5, which he felt was causally related to the accident that occurred February 19, 2008, claimant had a 25 percent permanent partial impairment to the body as a whole, with 5 percent being preexisting.[24]

Dr. Zimmerman found claimant to be at maximum medical improvement and assigned the following restrictions: no lifting more than 10 pounds occasionally and 5 pounds frequently; avoid frequent flexing of the lumbosacral spine; and avoid bending, stooping, squatting, crawling, kneeling and twisting activities at the lumbar level.[25] Dr. Zimmerman also found claimant to have a 100 percent task loss having lost the ability to perform all 42 tasks on the task list of Dick Santner. Dr. Zimmerman opined that he felt claimant was unemployable.

Dr. Zimmerman testified that claimant reported having problems with his back in 2005, but he had not seen the x-rays or MRI report that were done at that time.

Dr. Zimmerman indicated that lifting boxes is not something that would ordinarily cause a herniation of a disc resulting in surgery. If not for the preexisting conditions in his spine, claimant would not have had any permanent impairment from the incident in 2008.[26] Dr. Zimmerman also testified that claimant is in need of treatment in the form of medication and physical therapy.

Claimant was referred by the ALJ to Peter V. Bieri, M.D., for a court-ordered IME on September 30, 2010. After examining claimant and his medical records, Dr. Bieri opined that the injury of February 19, 2008, involving the low back aggravated claimant's preexisting disease of the lumbar spine at two levels resulting in symptomatology that required surgery at L4-5. He opined that claimant had a 5 percent whole person impairment directly attributable to the February 19, 2008, injury, and 5 percent whole person impairment for claimant's preexisting condition, for a total 10 percent whole person impairment.[27] He opined that if not for claimant's preexisting condition, claimant would not

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[24] Zimmerman Depo., Ex. 2 at 7 (Dr. Zimmerman's IME report dated July 12, 2010).

[25] Zimmerman Depo., Ex. 2 at 7 (Dr. Zimmerman's IME report dated July 12, 2010).

[26] Zimmerman Depo. at 44-45.

[27] Bieri Depo., Resp. Ex. B at 7 (Dr. Bieri's Sept. 30, 2010 IME report).

have sustained an injury and impairment from reaching alone.[28] Dr. Bieri also opined that he has never known reaching to cause a snap in the low back, but he does not usually doubt the history that his patients give him. Therefore, he had no reason to believe that the injury did not happen as claimant said it did.[29] Dr. Bieri's impairment opinions were expressed pursuant to the fourth edition of the AMA *Guides*.[30]

Dr. Bieri did confirm that at the time claimant's back popped, he had already had a disk herniation in his low back and had received an injection in 2005. Claimant also had unrelated problems of cirrhosis of the liver, high blood pressure and heart problems.

Dr. Bieri did not believe that claimant was in need of future treatment and assigned the following restrictions: limit lifting to 40 pounds occasionally, 20 pounds frequently and 10 pounds constantly; and repetitive bending, twisting, and lifting should be performed no more than occasionally to frequently.[31]

Dr. Bieri also reviewed the task list of Mr. Santner and opined that claimant could no longer perform 16 out of 42 tasks, for a 38 percent task loss.[32]

Claimant first met with board certified occupational and environmental specialist Donald T. Mead, M.D., on February 22, 2008. Claimant presented with complaints of back pain. Claimant admitted to having similar pain in his back several years prior, which was resolved with injections. Claimant was seen for several visits, with no improvement of his pain, and was referred to the pain clinic. Claimant had an MRI which revealed degenerative disc disease at L5-S1 and disc bulging at L4-L5 with some protrusion. Claimant was referred to a back specialist. Claimant underwent back surgery and developed bilateral foot numbness and bilateral leg pain along with his low back pain.

When Dr. Mead examined claimant on December 9, 2010, he found claimant to be at maximum medical improvement for chronic back pain and opined that claimant's diffuse bilateral foot numbness was more consistent with neuropathy than radiculopathy and that documentation of alcohol abuse would indicate that metabolic neuropathy was

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[28] Bieri Depo. at 15.

[29] Bieri Depo. at 45-46.

[30] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[31] Bieri Depo., Resp. Ex. B at 7-8 (Dr. Bieri's Sept. 30, 2010 IME report).

[32] Bieri Depo., Resp. Ex. C (Dick Santner's Task List). Dr. Bieri testified that he found 15 out of 42 tasks that claimant could no longer perform, but the task list has 16 marked that claimant can longer perform. (Bieri Depo. at 34.)

most likely the cause.[33] This numbness was determined to have appeared sometime after September 22, 2008.[34] He determined that the low back pain from the accident was an exacerbation of claimant's lumbar disk disease.[35]

Dr. Mead went on to assign the following impairment rating: 7 percent preexisting impairment to the body as a whole and 3 percent impairment to the body as a whole for the 2008 injury and resulting surgery, for a total impairment of 10 percent to the body as a whole for pain and rigidity of the lumbar spine,[36] all pursuant to the fourth edition of the AMA *Guides*.[37] He assigned this impairment despite opining that reaching is an activity of daily living.

Dr. Mead recommended that claimant not perform any heavy lifting or any frequent stooping. Dr. Mead reviewed the task list of Mr. Santner and found claimant to have a 42.9 percent task loss, having lost the ability to perform 18 out of 42 tasks. Dr. Mead believes that claimant is employable.

Claimant first met board certified neurological surgeon Geoffrey Blatt, M.D., on March 13, 2009, for evaluation of his back problems. This evaluation was at the request of respondent. Claimant denied any prior back problems, despite such being mentioned in his medical history. Dr. Blatt examined claimant and determined that claimant had multi-level degenerative changes in his lumbar spine and a herniation at L4-5 with nerve root impingement on the left side as well as spinal stenosis.[38] Dr. Blatt indicated that surgery was the next step for claimant and felt that another MRI would be appropriate to confirm this. Then claimant would be referred back to Dr. Reintjes for the procedure.

Dr. Blatt went on to opine that, absent any records to suggest claimant had a prior problem, claimant's complaints stem from the February 2008 incident that occurred while claimant was working. He also opined that claimant was not capable of working in a sedentary capacity at the time, but he was not willing to assign permanency until claimant was evaluated by a surgeon.

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[33] Mead Depo., Resp. Ex. B at 5 (Dr. Mead's Dec. 9, 2010, report).

[34] Mead Depo. at 46.

[35] Mead Depo. at 50.

[36] Mead Depo., Resp. Ex. B at 5 (Dr. Mead's Dec. 9, 2010, report).

[37] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[38] Blatt Depo., Ex. 2 at 2 (Dr. Blatt's Mar. 13, 2009 report).

After reviewing claimant's November 7, 2005, MRI, Dr. Blatt opined that although he still considered claimant a surgical candidate, he did not consider the lifting event at work an inciting incident of claimant's ongoing problems and did not consider claimant's problems to be workers compensation related. He, therefore, suggested that claimant seek medical treatment outside of the workers compensation arena.[39]

On November 24, 2009, claimant underwent an L4-5 laminectomy and diskectomy. A followup MRI scan displayed a little disc bulge at L4-5 without nerve root impingement. Dr. Blatt opined that given claimant's weight, he did not expect claimant's disc to be completely normal. He opined that claimant's symptoms would improve with time and recommended weight loss of 50 to 100 pounds for claimant, who at the time of the initial examination stood 6 feet tall and weighed 285 pounds.

On March 26, 2010, Dr. Blatt found claimant to be at maximum medical improvement, post surgery (the November 24, 2009, surgery). He went on to state that if claimant wanted to return to work, he would need to go for a functional capacity evaluation (FCE). On April 23, 2010, Dr. Blatt found claimant to have 5 percent permanent partial impairment to the body as a whole based on the fourth edition of the AMA *Guides*.[40]

Dr. Blatt opined that claimant did not have to be at work to have aggravated his back condition.[41] He stated that although reaching could cause a herniated disc, it was not the cause in claimant's situation as both of claimant's MRIs, from 2005 and from 2008, looked the same with no substantive change.

Dr. Blatt testified that he asked claimant if he had ever had back or leg pain before. He, as a general practice, asks about any prior problems because they always show up in the medical records. If he knows about prior problems beforehand, he is able to evaluate whether the problems are different or not.[42]

Dr. Blatt testified that in coming up with the 5 percent impairment rating that he assigned to claimant, he relied on the lumbar spine disc disruption section of the fourth edition of the AMA *Guides*.[43] He determined that claimant had clinical signs of lumbar injury without radiculopathy or loss of motion segment integrity and, therefore, was entitled

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[39] Blatt Depo., Ex. 3 (Dr. Blatt's Mar. 20, 2009, letter).

[40] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[41] Blatt Depo. Vol. II (Jan. 28, 2011) at 8.

[42] Blatt Depo. Vol. II (Jan. 28, 2011) at 27.

[43] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

5 percent impairment. He also felt that claimant had a preexisting impairment of 5 percent. If claimant only had complaints or symptoms, zero percent would have been assigned.[44]

Dr. Blatt testified:

> Q. The question is -- the question is, did he have any residual signs or symptoms on the day before the incident at Payless on February 19th, 2008 when he raised up and felt a sharp pain in his back.
>
> A. He said he didn't have any residuals, but that's not what you asked me. By the time I've seen him he's had an MRI and a myelogram that show there is abnormality. And I actually subsequently learn that he has an MRI from 2005 that shows the abnormality. I'm not trying to give you a hard time. I'm telling you these things are quite a straightforward as –[45]

A dispute arose during the depositions of Dr. Blatt. Medical records from claimant's treatment at St. Francis Health Center, from claimant's 2005 treatment, were offered by respondent as Exhibit 6 to Dr. Blatt's December 3, 2010, deposition. Claimant's attorney objected to the admission of the records, citing K.S.A. 44-519. However, several of the St. Francis Health Center records were contained in Exhibit 9 to Dr. Blatt's December 3, 2010, deposition. These records, stipulated to by claimant's attorney, were admitted without objection. Dr. Blatt utilized the medical records from St. Francis Health Center in forming his opinions regarding claimant's injuries and resulting impairment.

Claimant was referred by his attorney to vocational expert Dick Santner for an evaluation on September 8, 2010. Claimant described the workload with respondent as being in a sustained stooped over position for approximately two and a half hours. Mr. Santner created the task list utilized by Dr. Zimmerman, Dr. Mead and Dr. Bieri. After reviewing the medical reports of Dr. Zimmerman and Dr. Bieri, Mr. Santner found that, within the assigned restrictions of Dr. Bieri, claimant would be able to work earning $8.00 an hour. Under the restrictions of Dr. Zimmerman, he feels claimant is unemployable.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[46]

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[44] Blatt Depo. Vol. II (Jan. 28, 2011) at 63.

[45] Blatt Depo. Vol. II (Jan. 28, 2011) at 75-76.

[46] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[47]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[48]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[49]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[50]

K.S.A. 2007 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[51]

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[47] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[48] K.S.A. 2007 Supp. 44-501(a).

[49] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[50] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[51] K.S.A. 2007 Supp. 44-508(d).

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[52]

Respondent contends that claimant's injuries are the result of the normal activities of daily living, as claimant was merely reaching up for an empty box when the injury occurred. This issue has been litigated extensively over the years. The Kansas Court of Appeals, in *Johnson*,[53] was asked to determine if a claimant, who "injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead", had suffered personal injury by accident which arose out of and in the course of her employment.[54] The Court, in reversing both the ALJ and the Board, determined that the injury had been suffered while claimant was performing a normal activity of day-to-day living and it was, therefore, not compensable under the Kansas Workers Compensation Act (Act). Citing both *Boeckmann* and *Martin*, the Court analyzed the well-established rule that when an injury occurs at work, it is not compensable unless it is "fairly traceable to the employment," as contrasted with hazards to which a worker "would have been equally exposed apart from the employment."[55] The injury is compensable only if the "employment exposes the worker to an increased risk of injury of the type actually sustained."[56] In this instance, while claimant suffered the injury while simply reaching overhead for an empty box, his activities over the preceding 1 to 2 hours involved reaching, bending and stooping on a repetitive basis. Those types of activities do not occur as a normal activity of daily living. The injury is compensable because this claimant would not have been equally exposed to the risk that ultimately caused the injury apart from his employment.[57]

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[52] K.S.A. 2007 Supp. 44-508(e).

[53] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[54] *Johnson* at 787.

[55] *Johnson* at 789, citing *Siebert v. Hoch*, 100 Kan. 199, Syl. ¶ 5, 428 P.2d 825 (1967).

[56] *Johnson* at 789-790, citing *Angleton v. Starkan, Inc.*, 250 Kan. 711, 718, 828 P.2d 933 (1992).

[57] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 11, 61 P.3d 81 (2002).

The Board must next consider whether certain evidence is part of the record in this matter. A dispute arose regarding certain medical records pertaining to and connected with treatment at St. Francis Health Center, offered as exhibits to Dr. Blatt's and Dr. Mead's depositions. Claimant, citing K.S.A. 44-519, objected to the admissibility of those records as the doctors who created the records did not testify in this matter. Respondent correctly points out that certain of those records, specifically the MRI report from 2005, were admitted into the record without objection by claimant's attorney at Dr. Blatt's January 28, 2011, deposition. Additionally, the records were utilized by Dr. Blatt and Dr. Mead in forming their opinions regarding claimant's condition, both currently and as a preexisting condition. A testifying physician may consider medical evidence generated by absent physicians if expressing his or her own opinion rather than the absent physician's opinion.[58] The Board finds that the medical records are properly a part of this record and can be utilized by the testifying physicians in forming their own opinions regarding claimant's injuries and subsequent disability. The February 17, 2011, Order of the ALJ, sustaining claimant's objection to the admissibility of those records, is reversed.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[59]

The Award discusses, in detail, the analysis of the various healthcare providers regarding the injury to claimant and any associated functional impairment. The Board finds that claimant suffered an additional 5 percent whole person functional impairment as the result of the accident on February 19, 2008. The Award of the ALJ is affirmed in that regard.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[60]

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[58] *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

[59] K.S.A. 44-510e(a).

[60] K.S.A. 2007 Supp. 44-501(c).

Claimant was examined and/or treated by a multitude of healthcare providers in this matter. He was found to have a preexisting functional impairment in almost every instance. Even claimant's expert, Dr. Zimmerman, found claimant to have a preexisting functional impairment of 5 percent to the whole person. The abilities of Dr. Blatt and Dr. Mead to compare the MRI report from the 2005 accident with the report from the MRI done on March 26, 2008, support their opinions regarding claimant's preexisting condition. Only Dr. Mead varied from the 5 percent whole person impairment, finding claimant's preexisting impairment to be 7 percent to the whole person. The Board finds that the determination by the ALJ, that respondent has proven that claimant has a preexisting functional whole person impairment of 5 percent, should be affirmed.

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[61]

Claimant contends that he is permanently and totally incapable of working. While Dr. Zimmerman found claimant to be permanently and totally incapable of working, none of the other examining or treating physicians agreed with his opinion. Mr. Santner, claimant's vocational expert, opined that claimant would be able to obtain a job in the open labor market and he would come very close to earning a wage comparable to that which he was earning while working for respondent. A person who is permanently and totally disabled is one who is essentially and realistically unemployable.[62] This claimant does not satisfy that definition. The determination by the ALJ that claimant is not permanently and totally disabled is affirmed.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average

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[61] K.S.A. 44-510c(a)(2).

[62] Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

> weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[63]

Claimant is not working. The reason for his unemployment has been rendered irrelevant by *Bergstrom*.[64] The mere fact that he has no income compels a finding that his wage loss under K.S.A. 44-510e is 100 percent.

In determining the task loss suffered as the result of this accident, the ALJ considered and then averaged the opinions of Dr. Zimmerman, Dr. Mead and Dr. Bieri. His conclusion that claimant suffered a 59.67 percent task loss is adopted by and affirmed by the Board. In averaging both the wage loss and task loss, the Board finds that the award of a 79.84 percent permanent partial general disability award is proper and affirms same. After the reduction of the 5 percent whole person preexisting impairment, claimant's award of a 74.84 percent whole person permanent partial general disability is affirmed.

The Board has held in the past and continues to hold that TTD and permanent partial disability are exclusive of each other.[65] The award of compensation will be adjusted accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified with regard to the inclusion of the St. Francis Health Center records and the amount due and owing in this award, but otherwise affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

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[63] K.S.A. 44-510e.

[64] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[65] *Felipe v. Creekstone Farms Premium Beef*, No. 1,025,045, 2008 WL 375797 (Kan. WCAB Jan. 30, 2008).

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated February 18, 2011, is modified to allow the admissibility of the medical records omitted by the ALJ in his February 17, 2011, Order and modified with regard to the method of paying the compensation in this matter. The Award is further modified to reflect the proper amount of TTD to which claimant is entitled. The Award is affirmed in all other regards. Claimant suffered an accidental injury which arose out of and in the course of his employment on February 19, 2008. Claimant is awarded a 5 percent whole person permanent partial functional impairment, followed by a 74.84 percent permanent partial general disability award, after the deduction of the 5 percent whole person preexisting functional impairment.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jeffery L. Valyer, and against the respondent, Payless Shoesource, Inc., and its insurance carrier, Zurich American Insurance Company, for an accidental injury which occurred February 19, 2008, and based upon an average weekly wage of $376.00.

Claimant is entitled to 85.86 weeks of temporary total disability compensation at the rate of $250.68 per week totaling $21,523.38, plus by 17.21 weeks of permanent partial disability compensation at the rate of $250.68 per week totaling $4,314.20 for a 5 percent permanent partial whole body disability. In addition, effective March 27, 2010, claimant is entitled to 241.41 weeks of permanent partial disability compensation at the rate of $250.68 per week or $60,248.43 for a 74.84 percent permanent partial general disability, making a total award of $86,086.01.

As of July 20, 2011, there would be due and owing to claimant 85.86 weeks of temporary total disability compensation at the rate of $250.68 per week in the sum of $21,523.38, plus 85.92 weeks of permanent partial disability compensation at the rate of $250.68 per week in the sum of $21,538.43, for a total due and owing of $43,061.81, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $43,024.20 shall be paid at the rate of $250.68 per week for 171.63 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge